Circuit in the Washington Post case.[158] This time the D.C. Circuit elaborated on the balancing test--even suggesting that it might apply to all aspects of Exemption 4, not just the impairment prong--and held that "information will be withheld only when the affirmative interests in disclosure on the one side are outweighed by the factors identified in National Parks I (and its progeny) militating against disclosure on the other side."[159] Because the case was remanded once again (and ultimately was settled), the court did not actually rule on the outcome of such a balancing process.[160]

The district court decision in Critical Mass, on remand from the first panel decision of the D.C. Circuit, was the first decision to explicitly apply this balancing test under the impairment prong of Exemption 4.[161] (Although it did not expressly reference the term, one other district court has utilized a balancing test in ruling under the competitive harm prong.[162] For further discussion of this point, see Exemption 4, Competitive Harm Prong of National Parks, below.) In Critical Mass, the district court held that a consumer organization requesting information bearing upon the safety of nuclear power plants had "no particularized need of its own" for access to the information and thus was "remitted to the general public interest in disclosure for disclosure's sake to support its request."[163] Although the court conceded that the public has an interest "of significantly greater moment than idle curiosity" in information concerning the safety of nuclear power plants, that same interest was shared by the NRC and the submitter of the information and their interest in preventing disclosure was deemed to be of "a much more immediate and direct nature."[164] Curiously, when this decision in Critical Mass was subsequently reviewed by both a second panel of the D.C. Circuit and then by the entire D.C. Circuit sitting en banc, no mention was made of any balancing test under Exemption 4.[165]

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[158] 865 F.2d 320, 326-27 (D.C. Cir. 1989).

[159] Id. at 327.

[160] Id. at 328.

[161] 731 F. Supp. 554, 555-56 (D.D.C. 1990), rev'd in part on other grounds & remanded, 931 F.2d 939 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992); see also Pentagon Fed. Credit Union v. National Credit Union Admin., No. 95-1475-A, slip op. at 4 (E.D. Va. June 7, 1996) (in course of rejecting agency's impairment claim as "merely speculative," court references requester's citation to Washington Post test and notes requester's assertion of public interest in documents).

[162] Teich, 751 F. Supp. at 243.

[163] 731 F. Supp. at 556.

[164] Id.

[165] 931 F.2d 939, 945-47 (D.C. Cir.), vacated & reh'g en banc granted,

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EXEMPTION 4

Competitive Harm Prong of National Parks

The great majority of Exemption 4 cases have involved the competitive harm prong of the test for confidentiality established in National Parks & Conservation Ass'n v. Morton.[166] In order for an agency to make a determination under this prong it is essential that the submitter of the requested information be given an opportunity to provide the agency with its views on the possible competitive harm that would be caused by disclosure. While such an opportunity had long been voluntarily afforded submitters by several agencies and had been recommended by the Department of Justice,[167] it is now required by executive order.

Executive Order 12,600[168] provides for mandatory notification of submitters of confidential commercial information whenever an agency "determines that it may be required to disclose" such information under the FOIA.[169] Once submitters are notified, they must be given a reasonable period of time within which to object to disclosure of any of the requested information.[170] The executive order requires that agencies give careful consideration to the submitters' objections and provide them with a written statement explaining why any such objections are not sustained.[171] (For a further discussion of these procedures, see "Reverse" FOIA, Executive Order 12,600, below.)

As one court has emphasized, consultation with a submitter is "appropriate as one step in the evaluation process, [but it] is not sufficient to satisfy [an agency's] FOIA obligations."[172] Consequently, an agency is "required to determine for itself whether the information in question should be disclosed."[173] If an agency decides to invoke Exemption 4 and that decision is subsequently

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(...continued)
942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

[166] 498 F.2d 765, 770 (D.C. Cir. 1974).

[167] See FOIA Update, June 1982, at 3.

[168] 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (1994) and in FOIA Update, Summer 1987, at 2-3.

[169] Exec. Order No. 12,600, § 1.

[170] Id. § 4.

[171] Id. § 5.

[172] Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996).

[173] Id.; accord Exec. Order No. 12,600, § 5 (notification procedures specifically contemplate that agency makes ultimate determination concerning release); see also National Parks, 498 F.2d at 767 (in justifying nondisclosure, submitter's treatment of information held not to be "the only relevant inquiry"; rather, agency must be satisfied that harms underlying exemption are likely to occur).

challenged in court by a FOIA requester, the submitter's objections to disclosure--usually provided in an affidavit filed in conjunction with the agency's papers--will, in turn, be evaluated and relied upon by the court in determining the propriety of the exemption claim.[174]

The courts have tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines. For example, in some contexts customer names have been withheld because disclosure would cause substantial competitive harm[175] and in other contexts customer names have been ordered released because disclosure would not cause substantial competitive harm.[176] Similarly, in one case the table of contents and introductions to certain documents were withheld because the court found that their disclosure would

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[174] See, e.g., Pentagon Fed. Credit Union v. National Credit Union Admin., No. 95-1475-A, slip op. at 4-5 (E.D. Va. June 7, 1996) (rejecting competitive harm argument advanced by agency which had no submitter objections to provide court due to its failure even to give notice to submitters who, in turn, ultimately provided sworn declarations to requester explicitly stating that disclosure would not cause them harm); North Carolina Network for Animals v. USDA, No. 90-1443, slip op. at 8 (4th Cir. Feb. 5, 1991) (noting absence of sworn affidavits or detailed justification for withholding from submitters of information); Wiley Rein & Fielding v. United States Dep't of Commerce, 782 F. Supp. 675, 676 (D.D.C. 1992) (noting that "no evidence" was provided to indicate that submitters objected to disclosure), appeal dismissed as moot, No. 92-5122 (D.C. Cir. Mar. 8, 1993); Brown v. Department of Labor, No. 89-1220, slip op. at 6 (D.D.C. Feb. 15, 1991), appeal dismissed, No. 91-5108 (D.C. Cir. Dec. 3, 1991); Teich v. FDA, 751 F. Supp. 243, 254 (D.D.C. 1990) (after striking original declaration of submitter "on basic fairness grounds," court found submitter then "not able to support its position"), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992); Black Hills Alliance v. United States Forest Serv., 603 F. Supp. 117, 121 (D.S.D. 1984) (disclosure ordered with court noting that "[i]t is significant that [the submitter] itself has not submitted an affidavit addressing" the issue of competitive harm); see also Durnan v. United States Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991) (rejecting challenge to agency's reliance on submitter's declaration, finding it entirely "relevant" to competitive harm determination); Silverberg v. HHS, No. 89-2743, slip op. at 2-3 (D.D.C. June 26, 1990) (when only some submitters made objections to disclosure, court permitted requester to obtain copies of those objections through discovery in order to enable him to substantiate his claim that not all submitters were entitled to Exemption 4 protection) (discovery order).

[175] See, e.g., RMS Indus. v. DOD, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992); Goldstein v. ICC, No. 82-1511, slip op. at 6 (D.D.C. July 31, 1985) (case reopened and customer names found protectible); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,044, at 81,120 (D.D.C. Dec. 4, 1980).

[176] See, e.g., Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560, 1566 (D.D.C. 1985); Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. 287, 290 (D.D.C. 1980).

"provide valuable descriptions of proprietary information,"[177] but in another case, the court upheld an agency's decision to release a table of contents and other summary information because they revealed "only an outline" of the submitter's "operations and capabilities" and were "devoid of the detail which would be of value" to competitors.[178] The individualized and sometimes conflicting determinations indicative of competitive harm holdings is well illustrated in one case in which the Court of Appeals for the District of Columbia Circuit originally affirmed a district court's decision which found that customer names of "CAT" scanner manufacturers were protected,[179] but subsequently vacated that decision upon the death of one of its judges.[180] On reconsideration, the newly constituted panel found that disclosure of the customer list raised a factual question as to the showing of competitive harm that precluded the granting of summary judgment after all.[181]

Factual disputes concerning the likelihood that disclosure of requested information would cause competitive harm precluded a ruling on summary judgment motions in two cases decided this year by the District Court for the District of Columbia.[182] In the first case, after reviewing the "claims made by experts" representing both of the parties, the court concluded that because the claims were "contradictory," summary judgment was "an inappropriate vehicle" for resolution of the case, and the court instead scheduled a bench trial.[183] (The case was ultimately settled, however, and no trial took place.[184]) In the second case, the court found that the record did "not present a clear picture as to the competitive injury, if any, that would result from releasing" the requested document.[185] Rather than proceeding to a trial, the court in that case ordered that the document and

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[177] Allnet Communications Servs. v. FCC, No. 92-5351, slip op. at 5 (D.C. Cir. May 27, 1994).

[178] Dynalectron Corp. v. Department of the Air Force, No. 83-3399, slip op. at 11 (D.D.C. Oct. 30, 1984) (reverse FOIA suit).

[179] Greenberg v. FDA, 775 F.2d 1169, 1172-73 (D.C. Cir. 1985).

[180] Greenberg v. FDA, 803 F.2d 1213, 1215 (D.C. Cir. 1986).

[181] Id. at 1219.

[182] Public Citizen Health Research Group v. FDA, 964 F. Supp. 413, 416 (D.D.C. 1997); Public Citizen Health Research Group v. FDA, 953 F. Supp. 400, 402-03 (D.D.C. 1996), dismissed per stipulation, No. 94-0169, slip op. at 1 (D.D.C. Feb. 3, 1997).

[183] Public Citizen, 953 F. Supp. at 403.

[184] No. 94-0169, slip op. at 1 (D.D.C. Feb. 3, 1997) (agency agreed to release requested information as part of settlement).

[185] Public Citizen, 964 F. Supp. at 416.

a memorandum supporting its withholding be submitted to the court in camera.[186]

Actual competitive harm need not be demonstrated for purposes of the competitive harm prong; evidence of "actual competition and a likelihood of substantial competitive injury" is all that need be shown.[187] One court, however, has gone so far as to employ a balancing test under this prong--although it never expressly referred to it as such or cited to any authority supporting its application--finding that disclosure of certain safety and effectiveness data pertaining to a medical device was "unquestionably in the public interest" and that the benefit of releasing this type of information "far outstrips the negligible competitive harm" alleged by the submitter.[188] (For a further discussion of this point, see Exemption 4, Impairment Prong of National Parks, above.)

The Court of Appeals for the Ninth Circuit has cited to National Parks and then declared that it "agree[d] with the D.C. Circuit" that in making an Exemption

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[186] Id.

[187] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987) (reverse FOIA suit); accord Frazee v. United States Forest Serv., 97 F.3d 367, 371 (9th Cir. 1996) (reverse FOIA suit); GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994); Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); see, e.g., NBC v. SBA, No. 92 Civ. 6483, slip op. at 5 n.3 (S.D.N.Y. Jan. 28, 1993) (although court noted that agency "should have provided more details" regarding possible competitive harm, generalized sworn declaration from submitter found sufficient); Journal of Commerce, Inc. v. United States Dep't of the Treasury, No. 86-1075, slip op. at 4 (D.D.C. June 1, 1987) (submitter not required to document or pinpoint actual harm, but need only show its likelihood) (partial grant of summary judgment), renewed motion for summary judgment granted (D.D.C. Mar. 30, 1988), aff'd, 878 F.2d 1446 (Fed. Cir. 1989) (unpublished table decision); HLI Lordship Indus. v. Committee for Purchase from the Blind & Other Severely Handicapped, 663 F. Supp. 246, 251 (E.D. Va. 1987) (court concluded that competitive harm likely based upon fact that requester, who was a competitor of the submitter, had requested confidential treatment for its own similar submission); see also Hercules, Inc. v. Marsh, 659 F. Supp. 849, 854 (W.D. Va. 1987) (given fact that contract always awarded to submitter, protection under competitive harm prong unavailable as submitter failed to meet "threshold requirement" of facing competition) (reverse FOIA suit), aff'd, 839 F.2d 1027 (4th Cir. 1988).

[188] Teich, 751 F. Supp. at 253; see also Public Citizen, 964 F. Supp. at 415 (citing Teich and stating that "an additional factor that may be considered is whether there is a strong public interest in release of the information") (insufficient record precluded court from actually ruling on claim of competitive harm and in camera inspection ordered). But cf. Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 18 (C.D. Cal. May 10, 1993) (finding competitive harm and thus protecting research data used to support safety and effectiveness of pharmaceutical drug), aff'd in part & remanded in part on other grounds, 45 F.3d 1325 (9th Cir. 1995).

4 determination it "must balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information."[189] Although the Ninth Circuit thus used the term "balance," it did so in the context of holding that the agency had entirely failed to meet its burden of showing that disclosure of the very general information at issue was likely to cause "any potential for competitive harm, let alone substantial harm," and as a result, the court stated, rather colloquially, that the "FOIA's strong presumption in favor of disclosure trumps the contractors' right to privacy."[190]

Although "elaborate antitrust proceedings" are not required,[191] conclusory allegations of harm are unacceptable.[192] The Ninth Circuit reversed a competitive harm determination made by the lower court which had protected, on a standard government form, the "percentage and dollar amount of work subcontracted out" to small disadvantaged businesses.[193] In so deciding, the Ninth Circuit rejected the contention advanced by the submitting contractors that disclosure would allow their competitors to "undercut future bids," holding that their "rather conclusory statements" to that effect were insufficient as the data was "made up of too many fluctuating variables for competitors to gain any advantage from the disclosure."[194] Similarly, the District Court for the District of Columbia recently upheld an agency's decision to disclose three broad categories of information incorporated into a government contract--specifically, "cost and fee information, including material, labor and overhead costs, as well as target costs, target profits and fixed fees"; "component and configuration prices, including unit pricing and

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[189] GC Micro, 33 F.3d at 1115.

[190] Id.; cf. Martin Marietta Corp. v. Dalton, No. 94-2702, 1997 WL 459831, at *4 (D.D.C. Aug. 8, 1997) (in context of holding that submitter had failed to demonstrate that it would suffer competitive harm from release of information incorporated into government contract, court notes importance of opening government procurement process to public scrutiny) (reverse FOIA suit).

[191] National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 681 (D.C. Cir. 1976); accord GC Micro, 33 F.3d at 1115 ("law does not require [agency] to engage in a sophisticated economic analysis of the substantial competitive harm . . . that might result from disclosure"); Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

[192] See, e.g., Northwest Coalition for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 202 (D.D.C. 1996) ("Conclusory and generalized allegations do not sustain the burden of nondisclosure under [the] FOIA."); see also Lee, 923 F. Supp. at 455 (submitter failed to provide "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury"); Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (submitters "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict") (reverse FOIA suit).

[193] GC Micro, 33 F.3d at 1115.

[194] Id. at 1114-15.

contract line item numbers"; and "technical and management information, including subcontracting plans, asset allocation charts, and statements of the work necessary to accomplish certain system conversions"--based upon the submitter's failure to specifically demonstrate that it would suffer competitive harm from their release.[195] In upholding release of this information, the court affirmed the agency's determination that "neither the revelation of cost and pricing data nor proprietary management strategies were likely to result in such egregious injury to [the submitter] as to disable it as an effective competitor for [the agency's] business in the future."[196]

Some courts have utilized a "mosaic" approach to sustain a finding of competitive harm, thereby protecting information that would not in and of itself cause harm, but which would be harmful when combined with information already available to the requester.[197] In one case--where it was found that a company's labor costs would be revealed by disclosure of its wage rate and manhour information--the court took the opposite approach, and disaggregated the requested information, ordering release of the wage rates without the manhour information, because release of one without the other would not cause the company competitive harm.[198] In denying a competitive harm claim, another court noted that because the requested information pertained to every laboratory in a certain program, disclosure would not create a competitive advantage for any one of them because "each laboratory would have access to the same type of information as every other laboratory in the program."[199]

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[195] Martin Marietta, 1997 WL 459831, at **1, 4.

[196] Id. at *4.

[197] See, e.g., Lederle Lab. v. HHS, No. 88-0249, slip op. at 22-23 (D.D.C. July 14, 1988) (scientific tests and identities of agency reviewers withheld because disclosure would permit requester to "indirectly obtain that which is directly exempted from disclosure"); Timken Co. v. United States Customs Serv., 491 F. Supp. 557, 559 (D.D.C. 1980) (data reflecting sales between parent company and subsidiary withheld because even if disclosure of such data "would be insufficient, standing by itself, to allow computation of the cost of production, this cost would be ascertainable when coupled with other information").

[198] Painters Dist. Council Six v. GSA, No. 85-2971, slip op. at 8 (N.D. Ohio July 23, 1986); see also Lykes, No. 92-2780, slip op. at 15 (D.D.C. Sept. 2, 1993) (submitter failed to show any harm given fact that proposed disclosures would "redact all price terms, financial terms, rates and the like"); San Jose Mercury News v. Department of Justice, No. 88-20504, slip op. at 4-5 (N.D. Cal. Apr. 17, 1990) (no harm once company name and other identifying information deleted from requested forms).

[199] Silverberg v. HHS, No. 89-2743, slip op. at 10 (D.D.C. June 14, 1991), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); see also Carolina Biological Supply Co. v. USDA, No. 93CV00113, slip op. at 8 (M.D.N.C. Aug. 2, 1993) (competitive harm unlikely when all companies involved in same business will have equal access to information in question) (re-

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Many courts have held that if the information sought to be protected is itself publicly available through other sources, disclosure under the FOIA will not cause competitive harm and Exemption 4 is not applicable.[200] (The public availability of information has also defeated an agency's impairment claim.[201]) In addressing a claim of public availability, the District Court for the District of Columbia recently declared that it is "[t]he party asserting public availability [who] must initially produce evidence to support its assertion, but the burden of persuasion remains on the opponent of disclosure."[202]

In applying this principle, one court has held that simply because individuals subject to a drug test had "a right of access to the performance and testing information" of the laboratory conducting their tests, that did "not make the [requested] information [concerning all certified laboratories] publicly available."[203] Similarly, release of a summary of a safety and effectiveness study was found not to waive Exemption 4 protection for the underlying raw data because the disclosed information did not "match the withheld information."[204] Significantly, when an agency had previously released data without the

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verse FOIA suit).

[200] See, e.g., Anderson v. HHS, 907 F.2d 936, 952 (10th Cir. 1990) ("[N]o meritorious claim of confidentiality" can be made for documents which are in the public domain.); CNA, 830 F.2d at 1154 ("To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality--a sine qua non of Exemption 4."); Continental Stock Transfer & Trust Co. v. SEC, 566 F.2d 373, 375 (2d Cir. 1977); MCI Telecomms. Corp. v. GSA, No. 89-0746, slip op. at 17 (D.D.C. Mar. 25, 1992) ("publicly available documents cannot be considered confidential under Exemption 4"), defendants' subsequent motion for summary judgment granted on basis of collateral estoppel (D.D.C. Feb. 27, 1995). Compare Lee, 923 F. Supp. at 455 (competitive injury claim rejected for information already available to public, albeit in different format), with Niagara Mohawk Power Corp. v. United States Dep't of Energy, No. 95-0952, transcript at 8 (D.D.C. Feb. 23, 1996) (bench order) (competitive injury claim recognized when requested data was "not the same information" as that which was publicly available) (appeal pending).

[201] See Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1371 (E.D.N.C. 1986).

[202] Northwest Coalition, 941 F. Supp. at 202 (citing Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (reverse FOIA suit)).

[203] Silverberg, No. 89-2743, slip op. at 7 (D.D.C. June 14, 1991); see also Niagara Mohawk, No. 95-0952, transcript at 11-12 (D.D.C. Feb. 23, 1996) ("information is not publicly available just because it's been given to [requester] as part of [state] tax laws"; requester's acquisition "because of one hat it wears does not mean that other people . . . have the information or can get the information").

[204] Cohen v. Kessler, No. 95-6140, slip op. at 12 (D.N.J. Nov. 25, 1996).

submitter's "knowledge or consent," the District Court for the District of Columbia rejected the agency's argument that that data was "now in the public domain and no longer entitled to confidential treatment."[205] In rebuffing that proposition, the court held that "[t]he prior release of information to a limited number of requesters does not necessarily make the information a matter of common public knowledge, nor does it lessen the likelihood that [the submitter] might suffer competitive harm if it is disclosed again."[206]

Confidentiality was also upheld by the D.C. Circuit in a case where the requester argued that some of the withheld material had been disclosed "collaterally."[207] First, the court declared that "assuming that certain information is available publicly," it saw "little reason why the government must go through the expense and burden of producing the information now; there is no benefit to . . . [the requester] or to the public that can be gained by imposing such a duplicative function on the government."[208] As to the requester's argument that there was "value to be gained from the juxtaposition" of that "public information within" the submitter's materials, the D.C. Circuit found that the requester's own argument "concedes the confidentiality" of the material, because the requester clearly wanted "not only the collaterally disclosed information, but the proprietary manner with which" it had been utilized.[209]

The feasibility of "reverse engineering" (i.e., the process of independently recreating the requested information--for example, by obtaining a finished product and dismantling it to learn its constituent elements) has been considered in evaluating a showing of competitive harm because it "is germane to the question whether information is in the public domain (and thus whether a showing of competitive harm can be made)."[210] In Worthington Compressors, Inc. v. Costle,[211] the D.C. Circuit held that the cost of reverse engineering is a pertinent inquiry and that the test should be "whether release of the requested information, given its commercial value to competitors and the cost of acquiring it through other means, will cause substantial competitive harm to the business that

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[205] Martin Marietta, 1997 WL 459831, at *3.

[206] Id.; see also Public Citizen, 953 F. Supp. at 401, 405 (when submitter's document "inadvertently released" to requester by agency and subsequently filed on public record, court notes absence of evidence that anyone had "taken advantage" of that public access and so issues protective order sealing court record and precluding requester from publicly disseminating document pending court's determination of Exemption 4 applicability).

[207] Allnet, No. 92-5351, slip op. at 4 (D.C. Cir. May 27, 1994).

[208] Id.

[209] Id.

[210] Northwest Coalition, 941 F. Supp. at 202.

[211] 662 F.2d 45 (D.C. Cir.), supplemental opinion sub nom. Worthington Compressors, Inc. v. Gorsuch, 668 F.2d 1371 (D.C. Cir. 1981).

submitted it."[212] (This inquiry into the possibility of reverse engineering has been held inapplicable to documents protected as "trade secrets" under Exemption 4.[213])

In Worthington Compressors, the D.C. Circuit pointed out that agency disclosures of information that benefit competitors at the expense of submitters deserve "close attention" by the courts.[214] As the court of appeals observed:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.[215]

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[212] Id. at 52; accord Greenberg, 803 F.2d at 1218; Northwest Coalition, 941 F. Supp. at 202; Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 7-8 (M.D. Fla. June 3, 1986); Air Line Pilots Ass'n Int'l v. FAA, 552 F. Supp. 811, 814 (D.D.C. 1982); see also Zotos Int'l v. Young, 830 F.2d 350, 353 (D.C. Cir. 1987) (if commercially valuable information has remained secret for many years, it is incongruous to argue that it may be readily reverse-engineered) (non-FOIA case).

[213] See Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 2-3 (D.D.C. Dec. 16, 1987) (refusing to consider feasibility of reverse engineering for documents withheld as trade secrets because once trade secret determination is made, documents "`are exempt from disclosure, and no further inquiry is necessary'" (quoting Public Citizen, 704 F.2d at 1286)).

[214] 662 F.2d at 51.

[215] Id.; see, e.g., Cohen, No. 95-6140, slip op. at 12 (D.N.J. Nov. 25, 1996) (protecting raw data contained in research study submitted to obtain approval to market new animal drug as disclosure "would allow competitors to develop or refine their [own] products and avoid [incurring] the [corresponding] research and development costs because of the opportunity to piggy-back upon [the submitter's] development efforts," which "would therefore have [an] unwarranted deleterious impact on [the submitter's] competitive position"); Washington Psychiatric Soc'y v. OPM, No. 87-1913, slip op. at 5 (D.D.C. Oct. 13, 1988); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 9 (D.D.C. Sept. 29, 1987), modified (D.D.C. Nov. 20, 1987), motion to amend judgment denied (D.D.C. Dec. 16, 1987); Air Line Pilots Ass'n v. FAA, 552 F. Supp. 811, 814 (D.D.C. 1982); see also Allnet, 800 F. Supp. at 988-89 (noting submitter's twenty-two million dollar investment and rejecting requester's argument that receipt of seven million dollars in annual sales revenue is somehow "de minimis"); SMS Data Prods. Group, Inc. v. United States Dep't of the Air Force,

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This past year, a court rejected an agency's assertion of competitive harm for portions of a pesticide formula--which admittedly was capable of being reverse engineered--because the agency had failed to explain "how difficult and costly" it would be to do so, and, as the party "seeking to avoid disclosure," the agency was found not to have sustained its burden of "production and persuasion on that point."[216] Likewise, when information was found to be "freely or cheaply available from other sources," a court rejected a competitive harm claim, declaring that such information "cannot be considered protected confidential information."[217]

Neither the willingness of the requester to restrict circulation of the information[218] nor a claim by the requester that it is not a competitor of the submitter[219] should logically defeat a showing of competitive harm. The question is whether "public disclosure" would cause harm; there is no "middle ground between disclosure and nondisclosure."[220] Additionally, the passage of time, while

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No. 88-0481, slip op. at 7 (D.D.C. Mar. 31, 1989) (noting that release would allow competitors access to information that they would have to spend "considerable funds" to develop on their own).

[216] Northwest Coalition, 941 F. Supp. at 202.

[217] Frazee, 97 F.3d at 371 (upholding agency decision to release contractor's operating plan for managing recreational areas in national forest because "large portion of the [requested] information, such as details regarding collection and handling of fees, operating season dates, rules, and law enforcement, is available to anyone using or visiting the facilities" and other information, "such as employee uniforms, maintenance equipment, and signs, is in public view daily"--thereby making it unlikely that disclosure of operating plan would cause competitive harm); see also Atlantis Submarines Haw., Inc. v. United States Coast Guard, No. 93-00986, slip op. at 8 (D. Haw. Jan. 28, 1994) (finding that disclosure of admittedly "readily-observable" procedures in submarine operations manual would not afford competitors "any substantial `windfall'" and so would not cause competitive harm) (denying motion for preliminary injunction in reverse FOIA suit), dismissed per stipulation (D. Haw. Apr. 11, 1994).

[218] See Seawell, Dalton, Hughes & Timms v. Export-Import Bank, No. 84-241, slip op. at 2 (E.D. Va. July 27, 1984); cf. Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) ("limited access" to exempt records, subject to protective order, "not authorized by FOIA") (Exemption 7(C) case).

[219] See, e.g., Niagara Mohawk, No. 95-0952, transcript at 13 (D.D.C. Feb. 23, 1996) (rejecting requester's contention that because it was "not in competition" with submitter no harm would occur from release); Burke Energy Corp. v. Department of Energy for the United States, 583 F. Supp. 507, 512 (D. Kan. 1984) (characterizing requester's "argument that it is not a competitor" as "totally without merit").

[220] Seawell, No. 84-241, slip op. at 2 (E.D. Va. July 27, 1984).

sometimes eroding confidentiality,[221] does not necessarily defeat Exemption 4 protection, provided that disclosure of the material would still be likely to cause substantial competitive harm.[222]

Numerous types of competitive injury have been identified by the courts as properly cognizable under the competitive harm prong, including the harms generally caused by disclosure of: detailed financial information such as a company's assets, liabilities, and net worth;[223] a company's actual costs, break-even calculations, profits and profit rates;[224] data describing a company's workforce which would reveal labor costs, profit margins and competitive vulnerability;[225] a company's selling prices, purchase activity and freight charges;[226] a company's purchase records, including prices paid for advertising;[227] technical and commercial data, names of consultants and subcontractors, performance, cost and

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[221] See Lee, 923 F. Supp. at 455 (rejecting competitive harm argument because "financial information in question is given for [a period two years previously] and any potential detriment which could be caused by its disclosure would seem likely to have mitigated with the passage of time"); Teich, 751 F. Supp. at 253 (rejecting competitive harm protection based partly upon fact that documents were as much as 20 years old); see also Africa Fund v. Mosbacher, No. 92-289, slip op. at 19-20 (S.D.N.Y. May 26, 1993) (rejecting argument that exemption permanently precludes release because passage of time might render later disclosures "of little consequence").

[222] See, e.g., Burke, 583 F. Supp. at 514 (nine-year-old data protected); Timken Co. v. United States Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,976 (D.D.C. June 24, 1983) (ten-year-old data protected); see also FOIA Update, Fall 1983, at 14.

[223] See, e.g., National Parks, 547 F.2d at 684; Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, No. 87CV2384, slip op. at 8-9 (N.D. Ohio Apr. 22, 1992) (magistrate's recommendation) (dollar volume of business), adopted (N.D. Ohio May 22, 1992).

[224] See, e.g., Gulf & Western, 615 F.2d at 530; see also Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 12 (D.D.C. 1996) (General and Administrative (G & A) rate ceilings that are "nearly identical" to actual G & A rates) (alternative holding) (reverse FOIA suit), appeal dismissed voluntarily, No. 96-5163 (D.C. Cir. July 3, 1996); Niagara Mohawk, No. 95-0952, transcript at 3 (D.D.C. Feb. 23, 1996) ("operating expense information" which would reveal "costs of doing the jobs that the submitters provide").

[225] See, e.g., Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. 1976).

[226] See, e.g., Braintree, 494 F. Supp. at 289.

[227] See, e.g., Destileria Serralles, Inc. v. Department of the Treasury, No. 85-0837, slip op. at 9 (D.P.R. Sept. 22, 1988).

equipment information;[228] shipper and importer names, type and quantity of freight hauled, routing systems, cost of raw materials, and information constituting the "bread and butter" of a manufacturing company;[229] currently unannounced and future products, proprietary technical information, pricing strategy and subcontractor information;[230] raw research data used to support a pharmaceutical drug's safety and effectiveness, information regarding an unapproved application to market the drug in a different manner, and sales and distribution data of a drug manufacturer;[231] and technical proposals which are submitted, or could be used, in conjunction with offers on government contracts.[232]

The District Court for the Southern District of New York has recognized protection under the competitive harm prong for documents pertaining to a proposed real estate venture, despite the fact that the harm that would flow from disclosure would come from a citizens group, rather than from competing real estate developers.[233] The court made its finding in light of the fact that the "avowed goal" of that group was "to drive the joint venture out of business."[234] The court found that irrespective of the identity of the requester, "the economic injury they may inflict on the joint venture is nonetheless a competitive injury" that would "jeopardize both the venture's relative position vis-a-vis other New York City real estate developers and its solvency."[235] This holding was affirmed by the Court of Appeals for the Second Circuit, which reiterated that "[t]he fact that [the] harm would result from active hindrance by the [requester] rather than

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[228] See, e.g., RMS, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,189, at 81,495 (D.D.C. Mar. 20, 1981).

[229] See, e.g., Journal of Commerce, Inc. v. United States Dep't of the Treasury, No. 86-1075, slip op. at 6-8 (D.D.C. Mar. 30, 1988), aff'd, 878 F.2d 1446 (Fed. Cir. 1989) (unpublished table decision).

[230] See, e.g., SMS, No. 88-0481, slip op. at 6-8 (D.D.C. Mar. 31, 1989); see also Matthews v. United States Postal Serv., No. 92-1208-CV-W-8, slip op. at 6 (W.D. Mo. Apr. 15, 1994) (technical drawings relating to computer system sold to government, technology for which was still being sold to others).

[231] See Citizens Comm'n, No. 92-5313, slip op. at 18-20 (C.D. Cal. May 10, 1993); see also Cohen, No. 95-6140, slip op. at 11-12 (D.N.J. Nov. 25 1996).

[232] See, e.g., Joint Bd. of Control v. Bureau of Indian Affairs, No. 87-217, slip op. at 8 (D. Mont. Sept. 9, 1988); Landfair v. United States Dep't of the Army, 645 F. Supp. 325, 329 (D.D.C. 1986); Professional Review Org. v. HHS, 607 F. Supp. 423, 426 (D.D.C. 1985) (detailing manner in which professional services contract was to be conducted).

[233] Nadler v. FDIC, 899 F. Supp. 158, 163 (S.D.N.Y. 1995), aff'd, 92 F.3d 93 (2d Cir. 1996).

[234] Id.

[235] Id.

directly by potential competitors does not affect the fairness considerations that underlie Exemption Four."[236]

The Second Circuit was faced with another "unusual question" concerning the applicability of the competitive harm prong when it decided a case involving a FOIA requester who "already [had] knowledge of the confidential information contained in the withheld documents."[237] The case concerned a request for design drawings that had been submitted by two companies seeking approval to manufacture aircraft parts.[238] Those companies sought approval pursuant to "identicality" regulations, which permit a manufacturer to obtain approval for its parts based upon a showing that those parts are "identical" to parts which have already been approved; in this case, the approved parts were manufactured by the requester.[239] The requester argued that because the requested documents were "identical in all respects to the drawings" that it itself had previously submitted, they could not "be `confidential' as to [the requester] within the meaning of FOIA Exemption 4."[240] In rejecting that contention, the Second Circuit first noted that "[i]t is a basic principle under [the] FOIA that the individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed."[241] Accordingly, the fact that the requester "already ha[d] knowledge of the information contained in the withheld documents" was found to be "irrelevant."[242] The Second Circuit also rejected the requester's argument that the Supreme Court's decision in United States Department of Justice v. Julian,[243] supported its contention "that confidentiality under Exemption 4 should be examined on a requester-specific basis," holding that because the requester was "not the party for whom the protections of Exemption 4 were intended, it ha[d] no

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[236] Nadler v. FDIC, 92 F.3d 93, 97 (2d Cir. 1996). But cf. CNA, 830 F.2d at 1154 (in context of rejecting competitive harm argument based on "anticipated displeasure of [submitter's] employees" and on fear of "adverse public reaction," D.C. Circuit observed that such objections "simply do not amount to `harm flowing from the affirmative use of proprietary information by competitors'" (quoting Public Citizen, 704 F.2d at 1291 n.30)).

[237] United Techs. Corp. v. FAA, 102 F.3d 688, 689 (2d Cir. 1996), cert. denied, 117 S. Ct. 2479 (1997).

[238] Id.

[239] Id.

[240] Id. at 690.

[241] Id.

[242] Id. at 691.

[243] 486 U.S. 1 (1988) (holding that presentence report privilege, which is designed to protect subjects of such reports, cannot be invoked against those same subjects when they seek access to their own reports).

claim of special access."[244] Inasmuch as the requester "`freely concede[d]' that it [could not] prevail if it must proceed" as if it were "any other member of the general public," the Second Circuit upheld the agency's decision to withhold the information.[245]

On the other hand, protection under the competitive harm prong has been denied when the prospect of injury is remote[246]--for example when a government contract is not awarded competitively[247]--or when the requested information is too general in nature.[248]

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[244] United Techs., 102 F.3d at 691-92 (noting that test for determining competitive harm "does not appear to contemplate its application on a requester-specific basis").

[245] Id.

[246] See, e.g., Carolina, No. 93CV00113, slip op. at 9 (M.D.N.C. Aug. 2, 1993) (disclosure of number of animals sold by companies supplying laboratory specimens "will be simply a small addition to information available in the marketplace" and thus will not cause competitive harm); Teich, 751 F. Supp. at 254 (safety and effectiveness data pertaining to medical device ordered disclosed on basis of finding that at "this late date" in product approval process, disclosure "could not possibly help" competitors of submitter); see also Brown, No. 89-1220, slip op. at 5 (D.D.C. Feb. 15, 1991) (certain wage information not protected because no showing submitter would suffer "`substantial' injury" if information were disclosed).

[247] See Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988) (reverse FOIA suit); see also U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 12 (D.D.C. Mar. 26, 1986) (aggregate contract price for armored limousines for the President ordered disclosed as not competitively harmful given unique nature of contract and agency's role in design of vehicles); cf. Cove Shipping, Inc. v. Military Sealift Command, No. 84-2709, slip op. at 8-10 (D.D.C. Feb. 27, 1986) (contract's wage and benefit breakdown not protected because it related to "one isolated contract, in an industry where labor contracts vary from bid to bid") (civil discovery case in which Exemption 4 case law applied).

[248] See, e.g., GC Micro, 33 F.3d at 1111 (general information on percentage and dollar amount of work subcontracted out to small disadvantaged businesses that does not reveal "breakdown of how the contractor is subcontracting the work, nor . . . the subject matter of the prime contract or subcontracts, the number of subcontracts, the items or services subcontracted, or the subcontractors' locations or identities"); North Carolina Network, No. 90-1443, slip op. at 9 (4th Cir. Feb. 5, 1991) (general information regarding sales and pricing that would not reveal submitters' costs, profits, sources, or age, size, condition, or breed of animals sold); SMS, No. 88-0481, slip op. at 8 (D.D.C. Mar. 31, 1989) (general information regarding publicly held corporation's management structure, financial and production capabilities, corporate history and employees, most of which would be found in corporation's annual report and SEC filings and would in any event be

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EXEMPTION 4

In addition, several courts, including the D.C. Circuit, have held that the harms flowing from "embarrassing" disclosures, or disclosures which could cause "customer or employee disgruntlement,"[249] are not cognizable under Exemption 4.[250] (Moreover, such harms would not be cognizable under Ex

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readily available to any stockholder interested in obtaining such information); Davis Corp. v. United States, No. 87-3365, slip op. at 9 (D.D.C. Jan. 19, 1988) (information contained in letters from contractor to agency regarding performance of contract that did not reveal contractor's suppliers or costs) (reverse FOIA suit); EHE Nat'l Health Serv. v. HHS, No. 81-1087, slip op. at 5 (D.D.C. Feb. 24, 1984) ("mundane" information regarding submitter's operation) (reverse FOIA suit); American Scissors
Corp. v. GSA, No. 83-1562, slip op. at 8 (D.D.C. Nov. 15, 1983) (general description of manufacturing process with no details) (reverse FOIA suit).

[249] General Elec. Co. v. NRC, 750 F.2d 1394, 1402-03 (7th Cir. 1984) (reverse FOIA suit).

[250] See, e.g., CNA, 830 F.2d at 1154 ("unfavorable publicity" and "demoralized" employees insufficient for showing of competitive harm); Public Citizen, 704 F.2d at 1291 n.30 (quoting language from law review article to note that competitive harm should "`be limited to harm flowing from the affirmative use of proprietary information by competitors'" and "`should not be taken to mean'" harms such as "`customer or employee disgruntlement'" or "`embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials'"); Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, slip op. at 8 (W.D. Ark. Feb. 5, 1997) (court "cannot condone" use of FOIA "as shield[] against potentially negative, or inaccurate, publicity") (reverse FOIA suit) (appeal pending); Public Citizen, 964 F. Supp. at 415 n.2 (court finds it "questionable whether the competitive injury associated with `alarmism' qualifies under Exemption 4" because competitive harm does not encompass "adverse public reaction"); Martech USA, Inc. v. Reich, No. C-93-4137, slip op. at 5 (N.D. Cal. Nov. 24, 1993) (although "information could damage . . . [submitter's] reputation, this is not the type of competitive harm protected by" Exemption 4) (denying motion for temporary restraining order in reverse FOIA suit); Silverberg v. HHS, No. 89-2743, slip op. at 10 (D.D.C. June 14, 1991) (possibility that competitors might "distort" requested information and thus cause submitter embarrassment insufficient for showing of competitive harm); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) ("fear of litigation" insufficient for showing of competitive harm), aff'd in part & rev'd in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); cf. Playboy Enters. v. United States Customs Serv., 959 F. Supp. 11, 17 (D.D.C. 1997) (finding, in context of awarding attorney fees, that when agency initially withheld documents to protect "commercial interests of an alleged counterfeiter," that position was so unreasonable as to be "devoid of any merit"), appeal dismissed, No. 97-5128 (D.C. Cir. June 18, 1997). But see Bauer v. United States, No. 92-0376, slip op. at 4 (D.D.C. Sept. 30, 1993) (aberrational decision upholding deletion of name of corporation mentioned in
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emption 6 either, for it is well established that businesses have no "corporate privacy."[251] For a further discussion of this point, see Exemption 6, Privacy Considerations, below.) Nevertheless, the D.C. Circuit skirted this issue and expressly did not decide whether an allegation of harm flowing only from the embarrassing publicity associated with disclosure of a submitter's illegal payments to government officials would be sufficient to establish competitive harm.[252] The court did go on to hold, however, that the submitter's "right to an exemption, if any, depends upon the competitive significance of whatever information may be contained in the documents" and that the submitter's motive for seeking confidential treatment, even if it was to avoid embarrassing publicity, was "simply irrelevant."[253]

The status of unit prices in awarded government contracts remains a contentious issue. This past year, there was yet another challenge to an agency's decision to disclose, among other things, a contractor's unit price information.[254] In upholding the agency's decision to release the information, the District Court for the District of Columbia rejected the submitter's contention that disclosure would enable its competitors "to predict its costs and profit margin, significantly enhancing their ability to underbid."[255] Declaring that "[t]he public, including competitors who lost the business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured that the competition was fair; and indeed, even to learn how to be more effective competitors in the future," the court upheld the agency's decision to release the information because the submitter had "simply failed to demonstrate" how it would be competitively harmed by its disclosure.[256] Although noting that the submitter "might prefer that less be known about its operations, and that the reasons for its past successes remain a mystery to be solved by the competitors on their own," the court held that the submitter had not shown "that it will in fact be unable to duplicate those successes unless [the agency] acquiesces in keeping the

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investigatory report because release of name "in connection with a criminal investigation could cause undue speculation and commercial harm to that corporation"), remanded, No. 94-5205 (D.C. Cir. Apr. 14, 1995).

[251] See, e.g., National Parks, 547 F.2d at 685 n.44.

[252] Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 341 (D.C. Cir. 1989) (reverse FOIA suit).

[253] Id.

[254] Martin Marietta, 1997 WL 459831, at *1 (involving "cost and fee information," and "component and configuration prices"--including unit pricing and contract line item numbers--and "technical and management information").

[255] Id. at *3.

[256] Id. at *4.

competition in the dark."[257]

The outcome of that case was consistent with the four cases concerning contract price information that were decided two years ago--all of which were brought by submitters challenging the agencies' decisions to disclose such information--and in which none of the submitters were able to convince the court that disclosure of the prices charged the government would cause them to suffer competitive harm.[258] One of the cases was remanded back to the agency for further factfinding on that issue,[259] but in the remaining three cases the competitive harm arguments were rejected outright by the court.[260]

Additionally, there are three other cases which contain a thorough analysis of the possible effects of disclosure of unit prices--including two appellate decisions--and in all three of these cases the courts likewise denied Exemption 4 protection, finding that disclosure of the prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, and that the possibility of competitive harm was thus too speculative.[261]

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[257] Id.

[258] McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 326 (D.D.C. 1995) (reverse FOIA suit), vacated as moot, No. 95-5288 (D.C. Cir. Apr. 1, 1996); CC Distribs. v. Kinzinger, No. 94-1330, slip op. at 10-14 (D.D.C. June 28, 1995) (reverse FOIA suit); Chemical Waste Management, Inc. v. O'Leary, No. 94-2230, slip op. at 10-12 (D.D.C. Feb. 28, 1995) (reverse FOIA suit); Comdisco, Inc. v. GSA, 864 F. Supp. 510, 516 (E.D. Va. 1994) (reverse FOIA suit).

[259] Chemical Waste, No. 94-2230, slip op. at 11-12 (D.D.C. Feb. 28, 1995) (agency required to correct administrative record by addressing submitter's "actual complaints of [competitive] harm," i.e., that when contract was rebid, new contractor "will be asked to perform the exact same--and, as yet, unrendered--services that were expected to be performed under" existing contract).

[260] McDonnell Douglas, 895 F. Supp. at 326 (submitter "failed to show with any particularity how a competitor could use the information at issue to cause competitive injury"); CC Distribs., No. 94-1330, slip op. at 13 (D.D.C. June 28, 1995) (submitter failed "to explain how its competitors could reverse-engineer its pricing methods and deduce its concessions from suppliers," which it had conclusorily claimed would occur if its unit prices were disclosed); Comdisco, 864 F. Supp. at 516 (submitter failed to satisfy standard that it "present persuasive evidence that disclosure of the unit prices would reveal some confidential piece of information, such as a profit multiplier or risk assessment, that would place the submitter at a competitive disadvantage").

[261] Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Acumenics Research & Tech., Inc. v. United States Dep't of Justice, 843 F.2d 800, 808 (4th Cir. 1988) (reverse FOIA suit); J.H. Lawrence Co. v. Smith, No. 81-2993, slip op. at 8-9 (D. Md. Nov. 10, 1982). But see Sperry Univac Div. v. Baldrige, 3 Gov't Disclosure Serv. (P-H)

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In the most recent appellate court decision on this issue, the Court of Appeals for the Ninth Circuit denied Exemption 4 protection for the unit prices provided by a successful offeror despite the offeror's contention that competitors would be able to determine its profit margin by simply subtracting from the unit price the other component parts which are either set by statute or standardized within the industry.[262] The Ninth Circuit upheld the agency's determination that competitors would not be able to make this type of calculation because the component figures making up the unit price were not, in fact, standardized, but instead were subject to fluctuation.[263]

Similarly, in the absence of a showing of competitive harm, the District Court for the District of Columbia has denied Exemption 4 protection for the prices charged the government for computer equipment, stating that "[d]isclosure of prices charged the Government is a cost of doing business with the Government."[264] Indeed, this "cost of doing business" principle was expressly endorsed by the District Court for the District of Columbia as a "general proposition" that agencies may reasonably follow.[265] Although it is not applicable "to every case that arises,"[266] the court nevertheless found that it is "incumbent upon" a submitter challenging a contract price disclosure decision to "demonstrate that [an agency's] decision to follow this general proposition"--namely, that disclosure of contract prices is a cost of doing business with the government--is somehow

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¶ 83,265, at 84,052 (E.D. Va. June 16, 1982) (protecting unit prices on finding that they revealed submitter's pricing and discount strategy), appeal dismissed, No. 82-1723 (4th Cir. Nov. 22, 1982).

[262] Pacific Architects, 906 F.2d at 1347.

[263] Id. at 1347-48; see RMS, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992) (court "unconvinced based on the evidence that the release of contract bid prices, terms and conditions whether interim or final will harm the successful bidders"); see also GC Micro, 33 F.3d at 1114-15 (relying on Pacific Architects, court orders disclosure of percentage and dollar amount of work subcontracted out by defense contractors).

[264] Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981); accord CC Distribs., No. 94-1330, slip op. at 13 (D.D.C. June 28, 1995); JL Assocs., 90-2 CPD 261, B-239790 at 4 (Oct. 1, 1990) (Comptroller General decision noting that "disclosure of prices charged the government is ordinarily a cost of doing business with the government"); see also EHE, No. 81-1087, slip op. at 4 (D.D.C. Feb. 24, 1984) ("[O]ne who would do business with the government must expect that more of his offer is more likely to become known to others than in the case of a purely private agreement.").

[265] CC Distribs., No. 94-1330, slip op. at 13 (D.D.C. June 28, 1995).

[266] Id. (referring to Chemical Waste, No. 94-2230, slip op. at 11 (D.D.C. Feb. 28, 1995), where prices at issue were those of a subcontractor who was "not in privity of contract" with agency and thus was not, in fact, "doing business with the government").

arbitrary or capricious.[267] This ruling comports with the court's decision in an earlier unit price case in which it had recognized the "strong public interest in release of component and aggregate prices in Government contract awards."[268]

The current Federal Acquisition Regulation (FAR) also mandates the disclosure of successful offerors' unit prices (with some exceptions) in negotiated contracts in excess of $10,000 through a post-award debriefing process.[269] Because Exemption 4 protection is vitiated if the information is publicly available elsewhere, all unit prices of successful offerors that are required to be disclosed under the FAR debriefing scheme should not be considered to be within the available protection of Exemption 4.[270]

Several years ago, and prior to the decision by the D.C. Circuit in Critical Mass Energy Project v. NRC,[271] there were three cases involving unit prices decided by the District Court for the District of Columbia, with each case reaching a

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[267] Id.

[268] AT&T Info. Sys. v. GSA, 627 F. Supp. 1396, 1403 (D.D.C. 1986); rev'd on other grounds & remanded, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (reverse FOIA suit).

[269] 48 C.F.R. § 15.1003(b)(1)(iv) (1996).

[270] See FOIA Update, Fall 1984, at 4; FOIA Update, Winter 1986, at 6; accord Comdisco, 864 F. Supp. at 516 (noting that unit prices are "the sort of pricing information routinely disclosed under the [FAR]" (citing Acumenics, 843 F.2d at 807-08)); JL Assocs., 90-2 CPD 261, B-239790 at 4 n.2 (Oct. 1, 1990) (Comptroller General decision rejecting argument that disclosure of option unit prices would cause submitter competitive harm by revealing pricing strategy and decisionmaking process and noting that FAR "expressly advises awardees that the unit prices of awards will generally be disclosed to unsuccessful offerors"); cf. McDonnell Douglas Corp. v. Widnall, No. 94-0091, slip op. at 13 (D.D.C. Apr. 11, 1994) (in ruling on different FAR disclosure provision, court held that provision served as legal authorization for agency to release exercised option prices and thus such prices were "not protected from disclosure by the Trade Secrets Act" and court need not reach issue of applicability of Exemption 4), and McDonnell Douglas Corp. v. Widnall, No. 92-2211, slip op. at 8 (D.D.C. Apr. 11, 1994) (same), cases consolidated on appeal & remanded for further development of the record, 57 F.3d 1162, 1167 (D.C. Cir. 1995) (because agency's FAR "authorization argument is intertwined analytically" with Exemption 4 coverage issue, remand to agency ordered so that court "can have one considered and complete statement of the Air Force's position" on submitter's claim that its prices were protected by Exemption 4) (non-FOIA cases brought under Administrative Procedure Act). But see Environmental Tech., Inc. v. EPA, 822 F. Supp. 1226, 1229 n.4 (E.D. Va. 1993) (interpreting unit price FAR provision to actually prohibit release of unit prices if such information "constitutes `confidential business information'") (reverse FOIA suit).

[271] 975 F.2d 871 (D.C. Cir. 1992) (en banc).

different result. In one, the court ordered disclosure of the unit prices, rejecting as "highly speculative" the argument that their release would allow competitors to calculate the submitter's profit margin and thus be able to underbid it in future procurements.[272] In another case, the court determined that the submitter's competitive harm arguments were not speculative and it even went so far as to issue an injunction permanently prohibiting the agency from releasing those unit prices to the public.[273] In the third such case, the court found that it was a "fact-intensive question" whether the submitter would suffer competitive harm from release of its "price information" and it therefore declined to rule on the applicability of Exemption 4 in the context of a summary judgment motion.[274] (That case was never resolved on the merits by the District of Columbia court as the issue was first litigated by a party acting on behalf of the plaintiff in the Eastern District of Virginia[275] and the principle of collateral estoppel was then found to prevent the plaintiff from relitigating the issue in the District of Columbia.[276])

The District Court for the District of Columbia had issued another decision during that same time period in a case involving unexercised option prices rather than "ordinary" unit prices.[277] In that case, the court expressly stated that it "generally agrees that `[d]isclosure of prices charged the Government is a cost of doing business with the Government.'"[278] It then upheld the agency's decision to release the option prices because "competitively sensitive information such as cost, overhead, or profit identifiers would not be revealed."[279] This decision was

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[272] Brownstein Zeidman & Schomer v. Department of the Air Force, 781 F. Supp. 31, 33 (D.D.C. 1991).

[273] McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 10 (D.D.C. Jan. 24, 1992) (bench order), remanded for further consideration in light of Critical Mass, No. 92-5342 (D.C. Cir. Feb. 14, 1994), on remand, 895 F. Supp. 316, 319 (D.D.C. 1995) (Critical Mass found inapplicable; agency denied opportunity to remedy "inadequacies" in record; court held that permanent injunction "remains in place") (reverse FOIA suit), aff'd for agency failure to timely raise argument, No. 95-5290 (D.C. Cir. Sept. 17, 1996).

[274] MCI, No. 89-0746, slip op. at 15 (D.D.C. Mar. 25, 1992).

[275] Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A (E.D. Va. Sept. 10, 1992) (bench order).

[276] MCI, No. 89-0746, slip op. at 4-9 (D.D.C. Feb. 27, 1995).

[277] General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. 804, 807 (D.D.C. 1992), vacated as moot, No.92-5186 (D.C. Cir. Sept. 23, 1993) (reverse FOIA suit).

[278] Id. at 807 (quoting Racal-Milgo, 559 F. Supp. at 6).

[279] Id.; see RMS, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992) (rejecting competitive harm claim for "interim" prices).

subsequently vacated by the D.C. Circuit, however,[280] after the FOIA requester withdrew its request while the case was pending on appeal. In the absence of a FOIA requester seeking access to the information, the court held that the case had become moot.[281]

None of the above cases concerning unit prices involved a request for pricing information submitted by an unsuccessful offeror. In the first decision to touch on this point, the court considered a situation in which the requester did not actually seek unit prices, but instead had requested the bottom-line price (total cumulative price) that an unsuccessful offeror had proposed for a government contract, as well as the bottom-line prices it had proposed for four years' worth of contract options.[282] Accepting the submitter's contention that disclosure of these bottom-line prices would cause it to suffer competitive harm by enabling competitors to deduce its pricing strategy, the court found that unsuccessful offerors had a different expectation of confidentiality than successful offerors, that the public interest in disclosure of pricing information concerning unawarded contracts was slight, and most importantly, that the unsuccessful offeror--who would be competing with the successful offeror on the contract options as well as on future related contracts--had demonstrated factually how the contract and option prices could be used by its competitors to derive data harmful to its competitive position.[283]

Congress recently has addressed this issue by enacting a statute that prohibits most agencies from disclosing solicited contract proposals--which would contain proposed price information--if those proposals have not become incorporated into an ensuing government contract.[284] This Exemption 3 statute has the practical effect of providing statutory protection for the prices proposed by unsuccessful offerors because by definition, that information is not incorporated into the resulting government contract.[285]

In the immediate aftermath of Critical Mass, there were two decisions that

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[280] General Dynamics Corp. v. Department of the Air Force, No. 92-5186, slip op. at 1 (D.C. Cir. Sept. 23, 1993) (reverse FOIA suit).

[281] Id.

[282] Raytheon Co. v. Department of the Navy, No. 89-2481, slip op. at 2-3 (D.D.C. Dec. 22, 1989).

[283] Id. at 8-15; see also FOIA Update, Spring/Summer 1990, at 2; FOIA Update, Fall 1983, at 10-11.

[284] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 821, 110 Stat. 2422 (containing parallel measures applicable to both armed services and certain civilian agencies) (to be codified at 10 U.S.C. § 2305(g) and 41 U.S.C. § 253b(m)).

[285] See FOIA Update, Winter 1997, at 2 (discussing new statute and fact that key determinant of exempt status under it is whether proposal was incorporated into or otherwise set forth in resulting contract).

afforded protection to unit prices premised on the theory that contract submissions are "voluntary" and that such pricing terms are not customarily disclosed to the public.[286] (These decisions appear to implicitly define voluntary submissions according to the nature of the activity to which they are connected and thus are contrary to the policy guidance that has been issued by the Department of Justice concerning the voluntary/required distinction.[287] Indeed, one decision[288] has now been expressly disclaimed by another judge in that same judicial district for failing to identify any justification whatsoever for its conclusion.[289]) (For a further discussion of Critical Mass and its new standard, see Exemption 4, Applying Critical Mass, above.) In addition to affording protection to contract pricing information under Critical Mass, one of these decisions, in a rather cursory order issued from the bench, went on to alternatively afford protection under the competitive harm prong.[290] A third decision that had originally afforded protection to exercised option prices was subsequently vacated by the District Court for the District of Columbia on a motion to alter the judgment and the agency's decision to disclose such option prices was upheld as authorized by the FAR.[291]

Third Prong of National Parks

In addition to the impairment prong and the competitive harm prong of the test for confidentiality established in National Parks & Conservation Ass'n v. Morton, the decision specifically left open the possibility of a third prong that would protect other governmental interests, such as compliance and program effectiveness.[292] Several subsequent decisions reaffirmed this possibility in dicta[293]

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[286] Environmental Tech., 822 F. Supp. at 1229; Cohen, Dunn, No. 92-0057-A, transcript at 28 (E.D. Va. Sept. 10, 1992).

[287] See FOIA Update, Spring 1993, at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

[288] Environmental Tech., 822 F. Supp. at 1229.

[289] Comdisco, 864 F. Supp. at 517 n.8.

[290] Cohen, Dunn, No. 92-0057-A, transcript at 29; Findings of Fact at 7-8 (E.D. Va. Sept. 10, 1992) (accepting argument that disclosure of detailed unit price information would reveal pricing strategy and permit future bids to be predicted and undercut).

[291] McDonnell Douglas, No. 92-2211, slip op. at 1, 3, 8 (D.D.C. Apr. 11, 1994).

[292] 498 F.2d 765, 770 n.17 (D.C. Cir. 1974).

[293] Washington Post Co. v. HHS, 690 F.2d 252, 268 n.51 (D.C. Cir. 1982); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976); Public Citizen Health Research Group v. FDA, 539 F. Supp. 1320,

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and, as discussed below, with its en banc decision in Critical Mass Energy Project v. NRC, the Court of Appeals for the District of Columbia Circuit conclusively recognized the existence of a "third prong" under National Parks.[294]

The third prong received its first thorough appellate court analysis and acceptance by the Court of Appeals for the First Circuit.[295] In 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System, the First Circuit expressly admonished against using the two primary prongs of National Parks as "the exclusive criteria for determining confidentiality" and held that the pertinent inquiry is whether public disclosure of the information will harm an "identifiable private or governmental interest which the Congress sought to protect by enacting Exemption 4 of the FOIA."[296]

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1326 (D.D.C. 1982), rev'd & remanded on other grounds, 704 F.2d 1280 (D.C. Cir. 1983).

[294] 975 F.2d 871, 879 (D.C. Cir. 1992); see also FOIA Update, Spring 1993, at 7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

[295] 9 to 5 Org. for Women Office Workers v. Board of Governors of the Fed. Reserve Sys., 721 F.2d 1 (1st Cir. 1983); accord Africa Fund v. Mosbacher, No. 92-289, slip op. at 16 (S.D.N.Y. May 26, 1993) (finding third prong satisfied when agency "submitted extensive declarations that explain why disclosure of documents . . . would interfere with the export control system" (citing Durnan v. United States Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991))).

[296] 9 to 5, 721 F.2d at 10; see, e.g., Nadler v. FDIC, 899 F. Supp. 158, 161-63 (S.D.N.Y. 1995) (joint venture agreement acquired when FDIC became receiver of failed bank protected under third prong because disclosure could "hurt the venture's prospects for financial success," which in turn would "reduce returns to the FDIC," and thereby "interfere significantly with the FDIC's receivership program, which aims to maximize profits on the assets acquired from failed banks"), aff'd on other grounds, 92 F.3d 93 (2d Cir. 1996); Allnet Communication Servs. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) (computer models protected under third prong because disclosure would make providers of proprietary input data reluctant to supply such data to submitter, and without that data computer models would become ineffective, which, in turn, would reduce effectiveness of agency's program), aff'd on other grounds, No. 92-5351 (D.C. Cir. May 27, 1994); Clarke v. United States Dep't of the Treasury, No. 84-1873, slip op. at 4-6 (E.D. Pa. Jan. 24, 1986) (identities of Flower Bond owners protected under third prong because government had legitimate interest in fulfilling "pre-FOIA contractual commitments of confidentiality" given to investors in order to ensure that pool of future investors willing to purchase government securities was not reduced; if that occurred, the pool of money from which government borrows would correspondingly be reduced, thereby harming national interest); Comstock Int'l, Inc. v. Export-Import Bank, 464 F. Supp. 804, 808 (D.D.C. 1979) (loan applicant information withheld under third prong on showing that disclosure would impair Bank's ability to promote U.S. exports); see also FOIA Update, Fall 1983, at 15; cf. M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (settle-
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Thereafter, the Department of Justice issued policy guidance regarding Exemption 4 protection for "intrinsically valuable" records--records that are significant not for their content, but as valuable commodities which can be sold in the marketplace.[297] Because protection for such documents is well rooted in the legislative history of Exemption 4, the third prong of the National Parks test should permit the owners of such records to retain their full proprietary interest in them when release through the FOIA would result in a substantial loss of their market value.[298] Of course, this protection would be available only if there were sufficient evidence to demonstrate factually that potential customers would actually utilize the FOIA as a substitute for directly purchasing the records from the submitter.[299]

The third prong was at issue in a case decided several years ago that concerned an agency that had the authority--but had not yet had the time and resources--to promulgate a regulation that would require submission of certain data.[300] During this interim period the agency was relying on companies to vol-

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ment negotiation documents protected upon finding that "it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure . . . were required"). But see News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. 1264, 1269 (D. Mass. 1992) (recognizing existence of third prong, but declining to apply it based on lack of specific showing that agency effectiveness would be impaired), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992).

[297] See FOIA Update, Winter 1985, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value").

[298] See id.; see also FOIA Update, Fall 1983, at 3-5 (setting forth similar basis for protecting copyrighted materials against substantial adverse market effect caused by FOIA disclosure).

[299] See Brittany Dyeing & Printing Corp. v. EPA, No. 91-2711, slip op. at 10-12 (D.D.C. Mar. 12, 1993) (rejecting argument that FOIA disclosure of Dun & Bradstreet report would cause "loss of potential customers" because no evidence was presented to support contention that potential customers would use FOIA in such a manner, particularly in light of time involved in receiving information through FOIA process; nor was it shown how many such reports would be available through FOIA and court would not assume that majority, or even substantial number, could be so obtained); Key Bank of Me., Inc. v. SBA, No. 91-362-P, slip op. at 7 (D. Me. Dec. 31, 1992) (denying protection for Dun & Bradstreet reports because "the notion that those who are in need of credit information will use the government as a source in order to save costs belies common sense").

[300] Teich v. FDA, 751 F. Supp. 243, 251 (D.D.C. 1990), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992).

untarily submit the desired information.[301] In that case the court rejected the agency's argument that under these circumstances disclosure would impair its efficiency and effectiveness, holding instead that because Congress had "announced a preference for mandatory over voluntary submissions," the agency was "hard-pressed to support its claim that voluntary submissions are somehow more efficient."[302]

Thirteen years after the National Parks decision first raised the possibility that Exemption 4 could protect interests other than those reflected in the impairment and competitive harm prongs, a panel of the Court of Appeals for the District of Columbia Circuit embraced the third prong in the first appellate decision

[301] Id. at 251.

[302] Id. at 252-53.